1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wileyrein.com

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Kathleen A. Kirby
202.719.3360
kkirby@wileyrein.com

BY HAND

Kris Anne Monteith
Chief, Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Comcast Corporation
Response to Notice of Apparent Liability for Forfeiture (EB-06-IH-3723)

Dear Ms. Monteith:

The Radio-Television News Directors Association ("RTNDA"), together with the undersigned (collectively, the "Coalition"), hereby submits these comments in support of the request by Comcast Corporation ("Comcast"), that the Enforcement Bureau ("Bureau") cancel its four proposed forfeitures totaling $20,000 ("NALs") for what the Bureau found to be a willful violation by Comcast of the Commission's sponsorship identification rules. The Coalition believes that the sanctions imposed on Comcast, which operates an affiliated regional cable network, CN8, for its news coverage of consumer products, represent a flawed and unprecedented application of 47 C.F.R. §76.1615 (the "Rule")[1] of the Commission's rules, and serve as an affront to First Amendment values. In addition to being an unconstitutional content-based form of regulation, application of the Commission's Rule in this manner already has begun to drastically chill speech in newsrooms across the country, inhibiting broadcasters and cablecasters from fully serving their viewers.

RTNDA and its members are committed to providing accurate and credible news stories. RTNDA's standards pertaining to VNR use are part of the Commission's record.[2] Voluntary guidelines offered by private industry to promote

[1] The FCC found Comcast in violation of §76.1615, the sponsorship identification rule for cablecasts. *See Comcast Corporation*, Notice of Apparent Liability of Forfeiture, File No. EB-06-IH-3723, NAL/Acct. No. 200732080039, at ¶5 (Sept. 26, 2007) ("NAL2"); *Comcast Corporation*, Notice of Apparent Liability of Forfeiture, File No. EB-06-IH-3723, NAL/Acct. No. 200732080035, at ¶5 (Sept. 21, 2007) ("NAL1"). The Commission has a virtually identical provision for broadcasters. *See* 47 C.F.R. §73.1212. The Coalition's criticisms of the Commission's application of the cablecast rule in the NALs extend equally to application of the broadcast rule.

[2] *See* Letter from RTNDA to Marlene H. Dortch, Secretary, Federal Communications Commission, filed in MB Docket No. 05-171, at 2 (Oct. 5, 2006) ("RTNDA Letter").

best journalism practices, however, do not open the door for, or otherwise legitimize, *any* government regulation of the content of newscasts.

To the contrary, invoking the sponsorship identification statute passed by Congress[3] to police how journalists utilize information provided to them through the video equivalent of paper press releases represents a disturbing and unconstitutional intrusion by the government into newsrooms, and traverses into territory well beyond Congress' intent in adopting the statute. The Bureau's NALs, therefore, should be cancelled, and the underlying interpretation of the sponsorship identification rules rescinded.

The Bureau's Application of the Rule Is Unprecedented, Flawed and Contrary to Congressional Intent

As an initial matter, the Enforcement Bureau's conclusion that Section 317 and the Rule are applicable to situations where the content of a broadcast or cablecast was neither influenced by the video programming distributor's receipt of valuable consideration nor the result of an agreement for such exposure is mistaken.

In its response to the Bureau's Letters of Inquiry ("LOIs"), Comcast submits that it accessed the VNR footage contained in CN8's stories after it had rendered a licensing fee to CNN Newsource.[4] In other words, Comcast paid for access to the VNRs, not the converse. The Bureau appears to have given little consideration to the actual relationship between CN8 and the VNR producers (the NALs relegate this significant detail to footnotes).[5] But the applicability of the Rule hinges on consideration flowing *to* the broadcaster in *exchange* for airtime, not *from* the broadcaster for access to information, as in CN8's case.[6] When news operations are paying for the ability to access program material for potential use either on-air or as off-air resource material, rather than being paid to include such material in their programming, the rationale underlying the sponsorship identification rule is simply not germane. In fact, use of a pure sponsorship identification under these circumstances would itself be misleading to viewers, because the material is not, by definition, "sponsored."

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[3] *See* 47 U.S.C. § 317 (2000).
[4] NAL1 at ¶ 5, n.11; NAL2 at ¶5, n.11.
[5] *See id.*
[6] *See National Association for Better Broadcasting against Television Station KCOP(TV) Los Angeles, California* ("*NAAB*"), 4 FCC Rcd. 4988 at ¶26 (1989).

Even if Section 317 and the Rule are applicable to Comcast's actions, the Bureau has applied the Rule improperly. In 1960, Congress amended Section 317(a)(1), the statute upon which §76.1615 is based, to its current language that reads:

> All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: *Provided*, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

The 1960 amendment adopting the "proviso" language[7] was crafted in response to complaints that the FCC was being overzealous in its sanctions against broadcasters for failing to identify sponsors of material that was provided for free or at nominal charge.[8] The legislative history surrounding the provision makes clear that Congress' primary concern in adopting it was not to prevent broadcasters from receiving complimentary materials from outside sources, but rather to eliminate "'payola' and related improper practices in the broadcast and phonograph record industries."[9]

The legislative history, which the Bureau cites several times in the NALs,[10] indicates that *receipt of consideration by the broadcaster or a promise of consideration to the broadcaster* are the linchpins for the Rule's application. The Commission recognized as much in 2005 in its Public Notice concerning VNR usage when it stated:

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[7] The proviso of the statute and the Rule begins with the words "*Provided, however*" and explains that material provided without or at nominal charge does not constitute "valuable consideration." *See* §317(a)(1); *see also* NAL1 at ¶7; NAL2 at ¶7.

[8] *NABB*, 4 FCC Rcd. 4988 at ¶15.

[9] H.R. Rep. No. 1800, 86th Cong., 2d Sess. (1960), *reprinted in* 1960 U.S. Code Cong. & Admin. News (USCCAN) 3516, 3528 ("House Report").

[10] *See, e.g.*, NAL1 at ¶9, n. 19; NAL2 at ¶8, n. 19.

> In situations in which a broadcast licensee has not directly received or been promised consideration . . . [and] has no information concerning the making of such promise or payment, Section 317(a)(1) of the Act provides generally that no sponsorship identification is necessary with regard to material that is furnished to the licensee "without charge or at a nominal charge."[11]

Therefore, generally, when materials are furnished to the broadcaster free of charge for broadcast purposes, Congress and the Commission have made clear that sponsorship identification is *not* required. Hence, it is permissible for record distributors to provide free records to broadcast stations for broadcast purposes.[12] The same principle applies to video as well as audio.[13]

Similarly, news releases that are furnished to a broadcaster or cablecaster, even those provided by business groups and private persons, do not trigger the statute or the Rule. The examples offered by Congress make plain that a station's receipt of

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[11] *Public Notice, Commission Reminds Broadcast Licensees, Cable Operators and Others of Requirements Applicable to Video News Releases and Seeks Comment on the Use of Video News Releases by Broadcast Licensees and Cable Operators*, 20 FCC Rcd. 8593, 8595 (2005). The Commission chose not to take any formal action as a result of the comments submitted in response to the Public Notice, and as that docket lies dormant, the Enforcement Bureau has proceeded to issue LOIs to over 100 stations based on complaints that those broadcasters utilized VNR footage without proper sponsorship identification. The NALs issued against Comcast represent the Bureau's first action with respect to the LOIs. The Bureau's undiscriminating and overzealous crackdown on the usage of VNR footage represents a dramatic and aggressive shift in the FCC's interpretation of the sponsorship identification rules, which have rarely been utilized since the 1960s. *See NABB*, 4 FCC Rcd. 4988 at ¶15. Because of this apparent drastic change of policy, RTNDA submits that all parties would be better served with the commencement of an actual VNR-related rulemaking rather than the current ad-hoc process being conducted by the Enforcement Bureau, which already has served to drain the time and resources of the broadcast news operations forced to defend themselves in response to the LOIs.

[12] House Report at 3528 (Example 1); *Sponsorship Identification Rules*, 28 Fed. Reg. 4732, 4733 (Example 1) (1963).

[13] *See* House Report at 3531 (Example 26(a)); *Sponsorship*, 28 Fed. Reg. at 4634 (Example 26(a)). Just one month after the FCC issued the *VNR Public Notice*, Acting General Counsel Austin C. Schlick agreed that video footage provided to broadcasters did not require sponsorship identification, telling the Senate Commerce Committee that the proviso applies to "for example, music recordings or video provided without charge for use on the air, if there is no special promotion by the station." Statement of Austin C. Schlick, Federal Communications Commission, Before the Committee on Commerce, Science and Transportation, U.S. Senate (May 12, 2005).

news releases and the availability of interview subjects were never intended to activate the sponsorship identification requirements. Example 11 clearly states:

> News releases are furnished to a station by Government, business, labor and civic organizations, and private persons, with respect to their activities, and editorial comment therefrom is used on a program. No announcement is required.[14]

This example and other examples contained in the legislative history are *precisely* analogous to the situations at issue in the Center for Media and Democracy's ("CMD") complaints, in which stations received video materials that are the modern-day electronic equivalent of the written press release. These materials were provided and received *unconditionally*, without any corresponding promise or obligation on the part of the stations to use the materials at all, in any way. When a cablecaster or broadcaster exercises its *independent* judgment to utilize materials it has received from a third party, free from the influence of payment, any other form of valuable consideration, or an agreement that the station will give such material exposure in its programming, the sponsorship identification rule does not apply. The journalistic use in a news report of material gleaned from press releases, interviews, and their electronic equivalents - electronic press kits and video press releases - should not and cannot reasonably be viewed as the airing of a paid-for entertainment or "infomercial" program assembled and produced by an outside entity. The latter is the type of situation contemplated by the sponsorship identification provisions. The former – the journalistic excerpting of materials distributed by others – is not. When a broadcaster exercises its journalistic discretion to use a VNR – even in its entirety – it should be free from government oversight, as it would be if it utilized materials from a printed press release or other third party source.

As RTNDA previously has submitted, in broadcast newsrooms, VNRs function precisely like traditional written press releases, providing journalists with story ideas, quotations, images and background information.[15] Broadcast journalists then exercise their editorial discretion to craft a news story they believe will be of interest to their viewers. The process was perfectly illustrated in the instant cases by CN8's journalists, who utilized VNRs to create *original* stories about sleeping

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[14] House Report at 3529 (Example 11); *Sponsorship*, 28 Fed. Reg. at 4733 (Example 11).
[15] RTNDA Letter at 11-12.

aids, health and fitness, life insurance, laptop computer security, and the anniversary of a popular baking mix. VNRs generally are provided to stations free of charge and, as stated above, are in many instances only accessible to broadcasters who, like CN8, pay a licensing fee to access a service on which the VNRs are made available.[16] It is typically the policy of electronic journalists to identify the source of the material when those journalists make the determination that such disclosure is appropriate and relevant to the viewer's understanding or evaluation of the information being presented. Consistent with the First Amendment, that determination *must* remain within the province of newsrooms.

The Bureau's issuance of the NALs, however, ignores the plain meaning of the statute, its legislative history, and bedrock First Amendment principles. Instead, it has turned back the clock to 1960, when the Commission wreaked havoc with its expansive interpretation of the sponsorship identification statute. Congress saw to it then that the Commission was appropriately restrained. In this instance, it is undisputed that neither Comcast nor its affiliated regional cable network, CN8, received any payment or other compensation in exchange for airing the portions of the VNRs that appeared in consumer products related pieces. Again, to the extent that any valuable consideration was exchanged, it flowed from CN8 to CNN Newsource, not from the producer of the VNR. According to Comcast, CN8 had no direct contact whatsoever with a VNR producer. Assuming, *arguendo*, that the statute is applicable here, CN8's usage of the VNRs fits squarely within the language of the proviso that exempts such use from the sponsorship identification requirements.

The Bureau, however, undaunted by the facts and the language of the statute or the Rule, repeatedly makes the tenuous argument that the narrow exception to the proviso is applicable to CN8's use of material excerpted from the VNRs .[17] Under that exception, material provided free of charge does require a sponsorship identification if it is "furnished in consideration for an identification of any person, product, service, trademark or brand name beyond an identification reasonably related to the use of such service or property on the cablecast."[18] The Bureau submits that the exception is triggered where there is "too much focus on a product or brand name in the programming."[19] Apart from the obviously subjective nature

[16] RTNDA Letter at 11.
[17] *See* NAL1 at ¶8; NAL2 at ¶¶8-11.
[18] §317(a)(1); §76.1615.
[19] NAL1 at ¶7; NAL2 at ¶7.

of how much is "too much," which alone should dissuade the FCC from venturing into this area, the legislative history of the proviso also counsels that the Bureau's interpretation of the exception is flawed.

The Coalition is aware of no precedent at the Commission or Bureau level where the exception to the proviso has been invoked to find any broadcaster or cablecaster in violation of the sponsorship identification rules. The legislative history serves as the sole guide for proper application of the proviso exception. Again, within the legislative history, Congress offered several examples applying the statute in various hypothetical programming contexts.[20] Because Congress undoubtedly was mindful that government intrusion into the newsroom to question the editorial judgment of journalists is constitutionally anathema, these examples offer not a single instance where the rule would require a broadcast news operation to provide a sponsorship identification for editorial content. Obviously, an assessment of the applicability of the proviso exception to any particular program segment requires exacting scrutiny of the program's content. In the context of news programming, such an analysis necessarily implicates questioning the editorial judgments of broadcast journalists. It is no accident then that Congress shied away from applying the proviso exception as the Bureau has done. As stated above, the only example in the legislative history that references news operations pertains to news releases, which, it says, may be utilized freely at the broadcasters' editorial discretion without sponsorship identification.[21]

Examples that do apply the proviso exception, all within the *entertainment* programming context, suggest that the exception is triggered only when there is an agreement, express or implied, between the broadcaster and the supplying party to show product identifications that are "disproportionate to the subject matter" of the programming material that is gratuitously provided to the broadcaster.[22]

There is absolutely no evidence of an agreement of any kind, express or implied, between CN8 and the producers of the VNRs, and the NALs cite no such agreement. Basic principles of contract law require that for an agreement to occur, there must be a "manifestation of assent," or a "meeting of the minds."[23] Given that

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[20] *See* House Report at 3528-32.
[21] *See* House Report at 3529 (Example 11).
[22] *See, e.g.*, House Report at 3532 (Example 26(c)); *Sponsorship*, 28 Fed. Reg. at 4734 (Example 26(c)).
[23] *See* Restatement (Second) of Contracts §17(2) (1981-2007).

CN8 procured the VNRs through the CNN Newsource service, a meeting of the minds would be impossible - CN8 never even *communicated* with the VNR producers.[24]
Further, contrary to what the NALs contend, the legislative history clearly states that the test for whether the identification is "reasonably related" is not whether the identifications are more than fleeting, but rather whether the identifications are "*disproportionate* to the subject matter" of the material aired.[25] Again, the examples offered by Congress wisely refrain from making this determination about news programming. Outside of the news context, the proviso exception is applied overwhelmingly in situations where "undue attention," often in the form of extra close-ups, is paid to brand names or insignias of products or services provided by companies for use on entertainment programs.[26] These examples, where the product or service is provided for use *during* the program, are clearly inapposite to VNR usage because when a news operation utilizes portions of a VNR, it is *not* being provided with products depicted in the video.

The NALs acknowledge that all of the CN8 pieces that utilized VNR footage did so in the context of a "daily segment focusing on consumer issues."[27] The purpose of airing reports on consumer issues is often to inform viewers of the availability of various products in the marketplace. Depictions of these products within the stories are not only reasonable, they are *necessary*. Therefore, all of the depictions are related to the subject matter of the overall news piece – whether or not the

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[24] In the only example where an implied agreement was found, the bus company supplies a free film to the broadcaster, and the broadcaster uses the entire film. *See* House Report at 3532 (Example 26(c)); *Sponsorship*, 28 Fed. Reg. at 4734 (Example 26(c)). None of the facts here evidence any communication between CN8 and the VNR producer that suggest CN8 agreed to broadcast the VNR material in exchange for its receipt. NAL1 at ¶ 5, n.11; NAL2 at ¶5, n.11. There is no evidence in the record that the VNR producers were even aware that CN8 would have access to their VNRs. CN8 received the VNR through a third party, CNN Newsource. Moreover, CN8 used only excerpts it deemed newsworthy.

[25] House Report at 3532 (Example 26(c)); *Sponsorship*, 28 Fed. Reg. at 4734 (Example 26(c)) (emphasis added). Example 26(b), which the NAL cites, stands only for the proposition that a fleeting identification would *not* trigger the proviso exception. *See* House Report at 3532 (Example 26(b)); *Sponsorship*, 28 Fed. Reg. at 4734 (Example 26(b)). In Example 26(c), where the proviso exception is actually triggered, the bus company is identified to "an extent disproportionate to the subject matter of the [travel] film." *See* House Report at 3532 (Example 26(c)); *Sponsorship*, 28 Fed. Reg. at 4734 (Example 26(c)).

[26] *See, e.g.*, House Report at 3531 (Example 24(a)), 3532 (Example 27(a)); *Sponsorship*, 28 Fed. Reg. at 4734 (Examples 24(a), 27(a)).

[27] NAL1 at ¶8; NAL2 at ¶¶8-11.

depictions are "disproportionate" to the subject matter should not be a question for Commission review, but a determination that is left to the editorial discretion of broadcast news journalists.

In sum, the Bureau's rush to condemn CN8's alleged airing of "promotional material" without appropriate identification represents a strained and unprecedented application of the sponsorship identification rule that runs counter to Congressional intent and to the FCC's own past interpretations.[28]

The FCC's Intrusion Into CN8's Newsroom Contravenes the First Amendment

It is not surprising that the Bureau's application of the sponsorship identification rule in this context is unprecedented, because it is flatly unconstitutional. It is well established that broadcast journalists are "'entitled under the First Amendment to exercise 'the widest journalistic freedom consistent with their public [duties].'''[29] The Commission repeatedly has recognized the same principle.[30] The Bureau's second-guessing of the editorial discretion of electronic journalists can only be sustained if, at a minimum, the Bureau's actions were required to advance a "substantial" government interest.[31] The Bureau must address a "real, not merely

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[28] Even if this construction were permissible under the statute, it represents such a sweeping change in the Commission's own interpretation of the rules that imposition of a penalty without a full rulemaking proceeding violates the targeted broadcaster or cablecaster's due process rights. *See, e.g., Trinity Broadcasting v. FCC*, 211 F.2d 618, 632 (D.C. Cir. 2000), *citing General Elec. Co. v. EPA*, 53 F.2d 1324, 1333-34 (D.C. Cir. 1995). This striking change in FCC policy is also arbitrary and capricious agency action under the Administrative Procedure Act (APA). *See Fox Television Stations v. FCC*, ---F.3d ---, No. 06-1760, slipop. at 19 (2d Cir. June 24, 2007). To properly justify such a policy change under the APA, the Commission must initiate a rulemaking process and provide a "reasoned explanation" for the shift in enforcement of its sponsorship identification rules. *See id*. at 31.

[29] *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984) (quoting *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110 (1973)); *see also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("The choice of material to go into" the news "and the decisions made as to the limitations on the [scope] and content . . . constitute the exercise of editorial discretion and judgment.").

[30] *See, e.g.*, *American Broadcasting Companies, Inc.*, 83 F.C.C.2d 302, 305 (1980) ("The choice of what is or is not to be covered in the presentation of broadcast news is a matter committed to the licensee's good faith discretion."). In fact, the Commission just reiterated this very principle this month. *See In re Sonshine Family Television, Inc., Licensee of Station WBPH-TV, Bethlehem, Pennsylvania et al.*, Notice of Apparent Liability for Forfeiture, File No. EB-06-IH-3489, FCC 07-152, ¶ 5 (rel. Oct. 18, 2007).

[31] *See League of Women Voters*, 468 U.S. at 380.

conjectural" harm, and the regulation must "in fact alleviate these harms in a direct and material way."[32]

As stated above, application of the Rule in these instances is particularly troublesome because of the content-based nature of the determinations the Bureau makes to find CN8 is in violation of the Rule. When a regulation is content-based, it is subject to the most "exacting scrutiny" because such regulations have the tendency to "impose differential burdens on speech because of its content."[33] The examples provided in the legislative history make clear that to apply the proviso exception properly, the Commission must determine whether a product or service has been identified in a manner "beyond an identification reasonably related to the use of such service or property on the cablecast."[34]

In other words, when it is applied, the proviso exception demands intense scrutiny of the content of news stories by the Commission to determine whether that content has been edited or otherwise packaged to exclude "unreasonable" identifications. Under this formulation, the government is left with the Orwellian, and unconstitutional, task of determining what actually constitutes "news" and whether a journalist has erred by including certain audio or video. The Framers abhorred the idea of government acting as the check on potential journalistic errors, and the Supreme Court repeatedly has recognized that the risk of isolated journalistic mistakes is an appropriate price to pay for maintaining a free and open society.[35] The Commission itself has cautioned against the practice of monitoring journalists, warning that "in this democracy, no government agency can authenticate news, or should try to do so."[36]

And yet, the Bureau does precisely what is clearly forbidden by the First Amendment, inserting itself as the government check on news programming and pronouncing that the stories broadcast by CN8 – *which were based on CN8's independent judgments about the content's credibility and value to viewers and without consideration in exchange for their broadcast* - were in effect "promotional

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[32] *Turner*, 512 U.S. at 662.
[33] *Id.* at 642.
[34] §76.1615(a).
[35] *See, e.g., Tornillo*, 418 U.S. at 256 ("A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."); *Democratic Nat'l Comm.*, 412 U.S. at 125.
[36] *Complaints Covering CBS Program 'Hunger in America,'* 200 F.C.C.2d 143, 151 (1969).

material" because of the supposedly "extensive" showings of product names or logos.[37] Throughout the NALs, the Bureau proceeds to substitute its own standards for those of CN8's journalists. For example, the Bureau determined that one CN8 piece regarding life insurance was not "news," because CN8 included an interview segment from an Allstate representative as well as the Allstate logo. These editorial decisions, according to the Bureau, converted the news piece into "promotional material."[38] Similarly, the Bureau condemned a CN8 story about laptop security, scrutinizing CN8's decision to utilize "an on-screen graphic" provided in the VNR and to identify Trend Micro as the manufacturer of security software.[39] In applying the Rule in this manner, the Bureau has, incredibly, ordained itself gatekeeper for acceptable content in a news broadcast. The constitutional infirmities inherent in such an appointment are obvious. The Commission already has rejected a similar approach in its sound decision to abandon the Fairness Doctrine.[40]

The Commission has acknowledged that a broadcast journalist's receipt of written press releases or news reports does not require sponsorship identification.[41] There simply is no persuasive justification for treating differently a broadcast journalist's receipt and use of material from a video press release. Such completely arbitrary discrimination in the treatment of news reports based entirely on whether the press release was in printed or video form would violate both the free speech and free press rights of the broadcaster.[42] Governmental discrimination in the treatment of

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[37] NAL1 at ¶8; NAL2 at ¶¶8-11.
[38] *See id.*
[39] *See id.* at ¶10.
[40] *See Syracuse Peace Council against Television Station WTVH Syracuse, New York*, 2 FCC Rcd 5043, ¶ 20 (1987). Even in the context of the paternalistic Fairness Doctrine, the Commission was very deferential to the licensee in making the determination of whether the Doctrine was triggered, *i.e.*, whether a "controversial issue of public importance" was implicated. *See The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C.2d 1, 10 (1974) ("[W]e will continue to rely heavily on the reasonable, good faith judgments of our licensees in this area."). The Bureau's NALs, however, abandon the Commission's long-standing policy of deference, and substitute the Bureau's own judgment for the *journalistic* determinations of what constitutes "news" and how the news should be presented.
[41] *Sponsorship*, 28 Fed. Reg. at 4733 (Example 11).
[42] *See Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 193-94 (1999). Absent a "special characteristic" that would justify differential treatment, "[r]egulations that discriminate among media . . . often present serious First Amendment concerns" and generally are subject to strict scrutiny. *Turner Broadcasting System, Inc. v. FCC*, 512 .S. 622, 659-60 (1994); *See also, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983).

broadcast journalists and print journalists in this area would have no compelling or even reasonably persuasive basis and would therefore be unconstitutional.[43]

By treating video press releases differently from written releases, the Rule as applied is fatally under-inclusive in combating whatever perceived ills the Commission has sought to remedy. This dooms the Rule's validity under the First Amendment.[44]

The constitutional problems facing enforcement of these rules in the manner evidenced by the Comcast NALs extend far beyond the arbitrary and unjustifiable distinctions between written and video promotional materials and between broadcast/cable and print journalists. When a whistleblower or victim of crime or mistreatment provides documents, other materials or an interview to a journalist for possible use in an investigative report, even if the materials were self-serving, would the sponsorship identification rules require disclosure of the source's name, even when he chose to remain anonymous? Such a result would present a clearly intolerable intrusion into journalistic activities, constrict the flow of valuable information to the public, and would be flatly unconstitutional.

Journalists receive materials and information from many sources each and every day in a wide range of circumstances. They interview sources with a wide variety of perspectives and affiliations. In addition to video press releases of different types and from different sources, journalists regularly receive written statements and press releases, movie clips, product samples, publicity photos, personal photos and videos, and other source material for possible reference or inclusion in news. Journalists continually interview people affiliated with particular organizations or entities that have their own reasons and agendas for sharing their information or views with the press.

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[43] Neither of the circumstances which have been found to justify disparate government treatment of broadcast and print in other contexts – spectrum scarcity, *see Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969), or broadcasting's assertedly "unique accessibility to children," *see FCC v. Pacifica Foundation,* 438 U.S. 726 (1978) – provides any support for different treatment of broadcast and print journalists when it comes to the identification of news material and news sources.

[44] *See, e.g., R.A.V. v. City of St. Paul,* 505 U.S. 377, 387 (1992)*; Fox Television Stations*, No. 06-1760, slipop. at 24 (ability of children to hear fleeting expletives in programming deemed permissible by the FCC undermined rationale for barring the expletives in other contexts).

For the Commission to make electronic journalists strictly responsible for the motives and connections of their sources, and to closely regulate the way in which these journalists use and identify source material and information, would inject the agency into protected newsgathering and editorial activities to an unprecedented and inappropriate degree in clear conflict with those journalists' First Amendment rights.[45]

The NALs advance no government interest sufficient to justify this assault on CN8's constitutionally-protected editorial discretion. CN8's journalists made independent determinations that the material had informational value for its viewers. The Commission should proceed with great caution in this area of protected journalistic activity and assert itself only in those situations that present a clear violation of Section 317 that goes to its central purpose – requiring disclosure where a broadcaster has accepted payment in exchange for a promise of promotional mention.

The NALs and the LOIs Issued in Response to the Center for Media and Democracy's Complaints Have Had a Chilling Effect on Protected Speech

Newsrooms across the country have dramatically curtailed the use of third party video for fear that they too may be subject to future NALs, fines, or license renewal holds. Because the Commission chose to launch investigations into each and every alleged use of VNR material cited by CMD, many companies have instituted an outright ban on the use of VNR material, whether concerning a commercial product or the American Red Cross.

While CMD may declare this a victory, its view is mind-numbingly narrow. Just like paper news releases, which are utilized regularly by the press without government interference, VNRs historically have served a valuable role in alerting journalists to medical breakthroughs, to consumer product tests, to actions taken by government agencies, to new discoveries. They sometimes provide newsrooms

[45] The Bureau's intrusion into the newsroom comes less than a year after the Commission's recent indecency decisions in November 2006, where the Commission warned of the dangers of interfering with journalists' First Amendment rights. *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd. 13299, ¶ 69 (Rel. Nov. 6, 2006) (Stating that the Commission "recognize[s] the need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment's free press guarantee.")

with video they could not otherwise obtain. They often lead to stories that dissect and contravene claims made by the cited manufacturers or organizations.

Yet the Bureau's actions will serve only to eviscerate these sources of material of interest, and often significant value, to the public. The Bureau advances no principled test for determining the extent to which product identifications are acceptable. The Bureau offers only its unilateral conclusion that the product depictions contained in CN8's news segments were "extensive" and therefore "promotional material."[46] Because news programs are in an almost continual state of preparation, editing and distribution, it follows that a news executive who made use of VNRs would be occupied on nearly a full-time basis with the examination and satisfaction of the station's VNR legal obligations. These issues would have to be analyzed and acted upon on a program-by-program basis, virtually around the clock.[47] Given these circumstances, it should come as no surprise that the Bureau's NALs, coming on the heels of its enforcement letters, already are having a potent "chilling" effect on stations that use outside video to enhance and supplement their news coverage. Some news operations have eliminated the use of outside video altogether. As a result, their viewers have lost access to video that might explain or illustrate the promises of a newly released life-altering drug, or the potentially fatal dangers posed by a common food. VNR material that was not otherwise available enabled stations to cover President Bush's speech at the Boy Scout Jamboree, campaign appearances of a U.S. Senate candidate, Veteran's Day ceremonies held for veterans of recent combat, new treatments for Crohn's Disease and migraine headaches, and a new osteoarthritis education program. RTNDA's members report that certain companies have prohibited the traditional broadcast of holiday greetings to loved ones back home by troops serving overseas, because they might be construed as VNRs by the Commission and expose licensees to liability.

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[46] NAL1 at ¶8; NAL2 at ¶¶8-11.

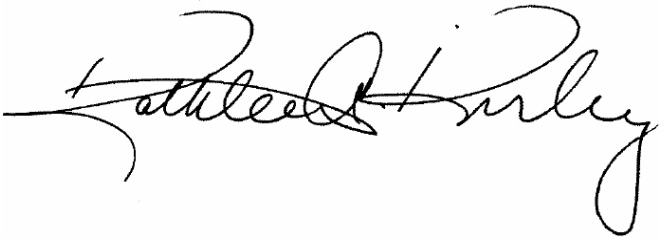
[47] Assuming that news operations were able to meet the logistical demands of determining when a sponsorship identification was required, deciding precisely to whom the content should be attributed under a sponsorship identification standard could prove difficult if not impossible given that the broadcast is not "sponsored" *per se*. In fact, such identification would itself be misleading because it would imply that the news organization has accepted money in exchange for broadcast exposure, when in fact no such exchange took place. Decisions concerning appropriate attribution of third party video should be left to the editorial judgment of journalists, who have a vested interest in maintaining credibility with their viewers.

Moreover, the reality is that the Bureau has thrust upon newsrooms the unenviable and virtually impossible task of determining not only whether VNRs, but also all kinds of third party materials used on-air or as resources will somehow trigger sponsorship identification requirements. Under the theory espoused in the NALs, the sponsorship identification requirements are triggered when a newsroom receives "something of value" that it includes in a broadcast. As stated above, journalists receive a plethora of materials and interview a variety of sources each and every day for possible reference or inclusion in the news. Is a family photo something of value? Would the station face sanction if it chose to honor the promise of confidentiality? The NALs represent an extraordinarily dangerous slippery slope upon which the Bureau has chosen to embark.

Conclusion

The Bureau's NALs and the underlying interpretation of the sponsorship identification rule turn the First Amendment on its head by permitting the government to become a newsroom watchdog. The Bureau's NALs not only represent an overreaction, but also a dangerous first step toward government censorship of news programming. The Coalition respectfully requests, therefore, that the Bureau cancel the NALs issued to Comcast for alleged violation of the sponsorship identification rule.

Respectfully submitted,



Kathleen A. Kirby
Sam Q. Le
Counsel for the
RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION
and the Coalition:

ALABAMA BROADCASTERS ASSOCIATION
ALASKA BROADCASTERS ASSOCIATION
ALLBRITTON COMMUNICATIONS COMPANY
AMERICAN BROADCASTING COMPANIES, INC. (ABC)
ARIZONA BROADCASTERS ASSOCIATION
ARKANSAS BROADCASTERS ASSOCIATION
BAHAKEL COMMUNICATIONS, LTD.
BELO CORPORATION
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CBS CORPORATION
CONNECTICUT BROADCASTERS ASSOCIATION
E.W. SCRIPPS COMPANY
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FOUR POINTS MEDIA GROUP LLC

FOX AFFILIATE BOARD OF GOVERNORS
FOX BROADCASTING COMPANY
FOX NEWS NETWORK, LLC
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GEORGIA ASSOCIATION OF BROADCASTERS
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LIN TELEVISION CORPORATION
LOCKWOOD BROADCAST GROUP
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MAINE ASSOCIATION OF BROADCASTERS
MARYLAND / DISTRICT OF COLUMBIA / DELAWARE BROADCASTERS ASSOCIATION
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MEREDITH CORPORATION
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MISSISSIPPI ASSOCIATION OF BROADCASTERS
MISSOURI BROADCASTERS ASSOCIATION
MONTANA BROADCASTERS ASSOCIATION
NATIONAL ASSOCIATION OF BROADCASTERS (NAB)
NBC TELEMUNDO LICENSE COMPANY
NBC TELEVISION NETWORK
NEBRASKA BROADCASTERS ASSOCIATION
NEVADA BROADCASTERS ASSOCIATION
NEW HAMPSHIRE ASSOCIATION OF BROADCASTERS
NEW JERSEY BROADCASTERS ASSOCIATION
NEW MEXICO BROADCASTERS ASSOCIATION
NEW VISION COMMUNICATIONS
THE NEW YORK STATE BROADCASTERS ASSOCIATION, INC.
NORTH CAROLINA ASSOCIATION OF BROADCASTERS
NORTH DAKOTA BROADCASTERS ASSOCIATION

OHIO ASSOCIATION OF BROADCASTERS
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WESTWIND COMMUNICATIONS LLC
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CERTIFICATE OF SERVICE

I, hereby certify that I caused a copy of the foregoing Letter to Kris Anne Monteith, Chief, Enforcement Bureau, Federal Communications Commission, to be served by U.S. Mail, as of this 31st day of October, 2007, on the following persons at the addresses shown below:

James L. Casserly
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, DC 20006
Counsel to Comcast Corporation

John Stauber
CENTER FOR MEDIA AND DEMOCRACY
520 University Avenue
Suite 227
Madison, WI 53703

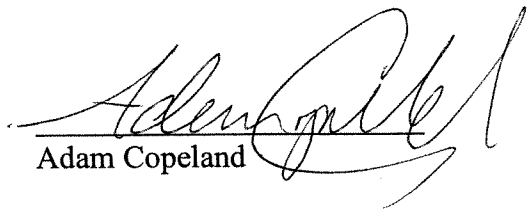
Honorable Kevin J. Martin
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, DC 20554

Honorable Michael J. Copps
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, DC 20554

Honorable Jonathan S. Adelstein
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, DC 20554

Honorable Deborah Taylor Tate
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, DC 20554

Honorable Roger M. McDowell
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, DC 20554



Adam Copeland

WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000